No. 82-958

In The
Supreme Court of the United States
October Term, 1982

McDONOUGH POWER EQUIPMENT, INC.,
Petitioner,

vs.

BILLY G. GREENWOOD, a minor child, by his parents and natural guardians, JOHN G. GREENWOOD and FREDA GREENWOOD, JOHN G. GREENWOOD, individually; and FREDA GREENWOOD, individually,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

DONALD PATTERSON
STEVE R. FABERT
FISHER, PATTERSON, SAYLER & SMITH
400 First National Bank Tower
Topeka, Kansas 66603 (913) 232-7761
Attorneys for Petitioner

COCKLE PRINTING C., 2311 Douglas St., Omaha 68102

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals deprived Petitioner of its Constitutional right to a trial by jury by vacating the District Court's judgment without any showing of error or prejudice.

2. Whether the Court of Appeals applied an erroneous standard of law to the facts alleged in plaintiff's appeal brief, by holding that a new trial is required whenever counsel does not receive information which might be material to the exercise of peremptory challenges.

3. Whether the Petitioner is entitled to a judgment in accordance with the jury's verdict under the correct standard of law for any or all of the following reasons:

(a) The facts presented by plaintiff do not establish a prima facie case of juror misconduct;

(b) The inference of prejudice suggested by plaintiff was contradicted by all evidence in the record; and

(c) Plaintiff's claim of juror misconduct was waived by failing to present evidence on that issue to the District Court.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

No. 82-958

In The

Supreme Court of the United States

October Term, 1982

McDONOUGH POWER EQUIPMENT, INC.,

Petitioner,

vs.

BILLY G. GREENWOOD, a minor child, by his parents and natural guardians, JOHN G. GREENWOOD and FREDA GREENWOOD, JOHN G. GREENWOOD, individually; and FREDA GREENWOOD, individually,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the U. S. Court of Appeals is reproduced in the appendix to the Petition for Certiorari at A-1. The opinion is reported at 687 F. 2d 338. The order of the Court of Appeals denying petitioner's motion for rehearing is reproduced in the appendix to the Petition for Certiorari at A-13.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on September 3, 1982. A timely petition for rehearing was filed on September 14, 1982. The petition for rehearing was denied on October 4, 1982. The Petition for Writ of Certiorari was filed within sixty (60) days subsequent to the denial of the petition for rehearing. This Court's jurisdiction is invoked under 28 U. S. C. Section 1254 (1) (1976). The Petition for Certiorari was granted on June 20, 1983.

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES THE CASE INVOLVES

1. The Seventh Amendment to the United States Constitution

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

2. 28 U. S. C. Section 1870

In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.

3. 28 U. S. C. Section 2111

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

4. F. R. C. P. 47 Jurors

(a) Examination of Jurors. The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper. * * *

5. F. R. C. P. 61 Harmless Error

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

6. F. R. C. P. 1 Scope of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

STATEMENT OF THE CASE

This is a personal injury products liability action involving an allegedly defective riding lawnmower. The three year old plaintiff was injured while playing with other children in a neighbor's yard, without parental supervision. The neighbor's thirteen year old son was operating a riding lawmower manufactured by defendant McDonough Power Equipment Company, Inc. at the time of the accident, likewise without parental supervision. Plaintiff's nine year old brother was seated on the operator's lap at the time of the accident.

Subject matter jurisdiction was based upon diversity of citizenship pursuant to 28 U.S.C. Section 1332. The case was tried in the U. S. District Court for the District of Kansas, sitting at Topeka, between April 4 and April 25, 1980. The jury returned a special verdict in accordance with the substantive law of the State of Kansas, where the accident occurred. The jury found no liability for the defendant manufacturer. The jury also found plaintiff's damages in the amount of $375,000.00. (Appendix pp. 65, 66).

In accordance with the special verdict, the Court entered judgment in favor of the defendant manufacturer. Plaintiff filed a timely motion for new trial, alleging eighteen grounds. The eighteenth ground alleged involved the Court's refusai to permit interrogation of the jurors by plaintiff's counsel, who sought to obtain evidence of juror misconduct. The remaining grounds involved issues that had previously been ruled upon by the Court. Plaintiff's motion for a new trial was ultimately denied, and plaintiff appealed. (Appendix pp. 90-93, 106).

The U. S. Court of Appeals for the Tenth Circuit ordered a new trial, based upon the alleged misconduct of juror Ronald Payton. Payton allegedly failed to reveal significant information requested by plaintiff's counsel during voir dire. Defendant denied that Payton had failed to reveal significant information, and further denied that plaintiff had made any showing to the Court that Payton or any other juror was biased. The Court of Appeals held that plaintiff's allegations were sufficient to require a new trial.

The trial judge never held that juror Payton had concealed significant information, or that he was biased or prejudiced. (Appendix pp. 72-85, 89-90, 106). The Court of Appeals did not hold that the trial judge abused his discretion in denying the motion for a new trial. The Court of Appeals made a *de novo* determination on the question of juror misconduct, based on allegations that had never been substantiated at the trial level. The Court of Appeals held that comments made by juror Payton during a discussion with counsel subsequent to trial supported the contention of misconduct. The contents of this conversation were never reported to the trial judge, and were never made a part of the District Court record. Plaintiff's counsel had been granted permission to approach juror Payton for the purpose of obtaining support for his motion for a new trial. Because the results of the interview were not reported to the trial judge, that information had no influence on the decision to deny the motion.

The specific act of misconduct alleged was the failure of juror Payton to respond to a question asked by plaintiff's counsel:

> Now, how many of you have yourself or any members of your immediate family sustained any severe injury, not necessarily as severe as Billy, but sustained any injuries whether it was an accident at home, or on the farm or at work that resulted in any disability or prolonged pain or suffering, that is you or any members of your immediate family? (Appendix p. 19).

In support of a post trial motion to approach juror Payton, plaintiff's father submitted an affidavit alleging that juror Payton's son had suffered a broken leg caused by the accidental separation of a truck wheel. (Appendix pp. 87-88). In response to this motion defense counsel requested that any juror interview take place in the presence of all counsel and a Judge or Magistrate, and that a permanent record be made of the interview. (Appendix p. 71). The trial judge granted leave to contact Mr. Payton and question him concerning the allegations. Unfortunately the trial judge did not require that a permanent record of juror Payton's comments be made. (Appendix pp. 89-90). The trial judge described his understanding of the issue to be resolved in the following terms:

> Counsel should be informed that the Court's review of the court reporter's notes of voir dire indicates that plaintiff's counsel's question should have elicited a response from the juror only if (1) his son was in an accident as alleged and (2) the son sustained a disability or suffered prolonged pain.
>
> Frankly, the Court is not overly impressed with the significance of this particular situation. It would seem that a juror whose son had been injured in a products liability setting would be the type of juror that plaintiff would be looking for in this type of case. We note that at least one other juror who responded affirmatively to this particular area of questioning was not the subject of a peremptory challenge from either side. (Appendix pp. 89-90).

Persission to interview juror Payton was granted on May 5, 1980. Plaintiff's motion for new trial was also filed on that day. (Appendix pp. 90-93). Payton was interviewed by telephone the next day. The results of the interview were not reported to the trial judge.

During the course of jury selection counsel for both parties inquired extensively about potential prejudices. Counsel for defendant inquired about the jurors' ability to put aside any prejudices they might have in favor of a small child who had suffered a severe injury. (Appendix pp. 49-62). Counsel for plaintiff focused on prejudices against plaintiffs in general, and against the awarding of large monetary sums for personal injuries. (Appendix pp. 16-48).

Counsel for plaintiff specifically inquired into abnormal or unusual attitudes toward pain and suffering. Marguerite Finnigan was questioned at some length by plaintiff's counsel about her history of employment as a nurse, and the effect her exposure to pain and suffering might have on her objectivity as a juror. (Appendix pp. 35-36). At the time plaintiff's counsel inquired of Mrs. Finnigan about her attitude toward pain and suffering, the only information in the record which would put counsel on notice of a need to inquire about her attitude was her employment.

Plaintiff's counsel was also aware that Ronald Payton was a butcher employed by Iowa Beef Processors (a slaughter house). (Appendix p. 11). The questions directed to Mr. Finnigan concerning her attitude toward pain and suffering were not asked of juror Payton. There is no explanation in the record why plaintiff's counsel would inquire about a nurse's attitude toward pain and

suffering yet forego a similar inquiry of a slaughter house employee, other than the fact that "trial counsel for the Greenwoods, Mr. Schroer, had anticipated that Payton would be a good juror for the plaintiff since he was a meat cutter from Emporia, Kansas and perhaps might be aware counsel for plaintiff had represented a meat cutter from St. Joseph, Missouri". (See Brief of Respondents in Opposition, pg. 16).

At least one other member of the jury panel failed to perceive the intent of the question which Payton failed to answer. Mrs. Finnigan's husband had been involved in a serious product related injury. This fact was revealed during voir dire examination by defense counsel:

> Mr. Patterson. Now, I notice that a number of you, either yourselves or someone in your immediate family pursue occupations that involve machinery either on a production line or in some other capacity. Are there any among you who either yourself, your immediate family, close friend or a neighbor have ever been injured on any kind of a machine whether it is at home or whether it is at work, at the factory or whatever? If so, would you please raise your hand.
>
> (Reporter's Note: Response.)
>
> Mr. Patterson. Mrs. Finnigan?
>
> Mrs. Finnigan: When my husband was working one time he was cleaning out a machine, and put his hand in it to clean it out, and somebody turned the machine on and it stripped the back of his hand off.
>
> Mr. Patterson. Now how long ago did that happen?
>
> Mrs. Finnigan: Oh, that's been a long time too. About 15 years.
>
> Mr. Patterson: As a result of that experience was there any kind of a claim made by your husband against the manufacturer of the machine?

> Mrs. Finnigan: Oh, no. No, it wasn't. It didn't have anything to do with the machine, it was a human error of somebody else. (Appendix, pp. 53-54).

Juror Cook also failed to reveal an injury to his son until defense counsel inquired generally about injuries to family members. (Appendix p. 54). Both Cook and Finnigan remained on the jury. (Appendix p. 64). None of the veniremen who were subjects of peremptory challenge by Respondents revealed injuries to family members. Peremptory challenges were used in the following sequence:

P1: David S. Kerns

D1: Connie S. Gladhill

P2: Harvey A. Barnhill

D2: Ethelyn L. Roose

P3: Joy E. Wendt

D3: Steve L. Hillard

(Appendix p. 64).

Mr. Kerns was employed by a tool and die company. He was questioned concerning his possible sympathy for manufacturers. (Appendix pp. 41-42). Mr. Barnhill was questioned about his wife's employment with an insurance company. (Appendix pp. 21-22). Mrs. Wendt was the personal secretary of a bank president. Her husband was a telephone company engineer. (Appendix p. 28).

During the post-trial interview Payton confirmed that his son had suffered a broken leg under the circumstances alleged, but explained that no disability or prolonged pain had resulted. The summertime injury did not prevent young Payton from playing high school football a few months later. Plaintiff's counsel made no arrangements

either to tape the interview or to have a stenographic transcript made. When the results of the interview were ultimately described in appellate briefs, each counsel relied upon his own telephone notes and personal recollection of the interview.

Counsel for defendant's recollection of the interview was that Payton confirmed the truthfulness and completeness of his answers during voir dire. Contemporaneous notes of the conversation made by defense counsel indicate that juror Payton affirmed repeatedly that his son's injury did not influence his attitude toward the merits of the case. The comments quoted by plaintiff's counsel, to the effect that the son's injuries did not "make any difference", were interpreted by defense counsel to indicate that the son's injury made no difference to juror Payton's behavior as a juror, not that he had been indifferent to his son's pain and suffering at the time the injury occurred.

Two of the three members of the Court of Appeals panel considered plaintiff's counsel's report of the interview sufficient grounds to order a new trial of the entire case. The majority members of the panel held that juror Payton's failure to reveal the fact of his son's injury, although concededly innocent, deprived plaintiff's counsel of information that might have influenced the manner in which voir dire was conducted. The majority members did not hold that the post-trial revelations by juror Payton were evidence that he was in fact biased. It was instead held that the post-trial revelations were sufficiently material to induce a prudent plaintiff's counsel to inquire further into the subject of juror Payton's attitude toward pain and suffering, and that such further inquiry might have revealed evidence of bias.

The majority opinion of the Court of Appeals offered no explanation for the failure of plaintiff's counsel to make the same inquiry of Mr. Payton that he had made of Mrs. Finnigan. No explanation was offered for the finding of "materiality", despite the obvious inference to be drawn from Payton's employment history.

The third member of the panel dissented, arguing that the most plaintiff was entitled to was a hearing before the district court judge for the purpose of making factual determinations on the allegations of misconduct. This panel member also voted to grant defendant's motion for rehearing and submit the appeal to the Tenth Circuit *en banc*.

———o———

SUMMARY OF ARGUMENT

This is an appeal from the denial of a new trial in a civil case. Two of the three members of the appeals panel voted to order a new trial for the very narrow and specific reason that plaintiff's statutory right to exercise peremptory challenges had been impaired. The Court of Appeals did not find that plaintiff was deprived of a fair trial by an impartial jury. There was no finding that any juror was in fact biased. Every juror was found to have acted in good faith. A new trial was ordered because it was felt that plaintiff's counsel had been deprived of the ability to exercise his peremptory challenges intelligently, through the innocent failure of a juror to reveal pertinent information during voir dire.

Petitioner was entitled to a trial by jury under the Seventh Amendment to the United States Constitution.

The trial court was required to enter judgment in accordance with the jury's verdict in the absence of a showing of actual prejudice resulting in impairment of a substantial right held by plaintiff, under F.R.C.P. 61. The procedures followed by the District Court Judge were proper and reasonable under F.R.C.P. 47. The plaintiff's motion for a new trial was denied without an abuse of discretion, since no evidence was presented at the District Court level of the impairment of any substantial right of the plaintiff.

The petitioner was deprived of the benefit of the jury's verdict without due process, because the Court of Appeals applied an irrebuttable presumption of misconduct and resulting prejudice. The Court of Appeals refused to consider any evidence in the record in making the determination of misconduct and prejudice. No rational principle of decision was set out under which a litigant could predict the finality of a verdict. No rational rule of law was set out which would permit Court or counsel to avoid reversible error in the future. The Court of Appeals gave no suggestions for a procedure by which counsel could obtain in the future sufficient information to permit the "intelligent" exercise of peremptory challenges.

The Tenth Circuit Court of Appeals elevated the statutory right to peremptory challenges provided in 28 U. S. C. Section 1870 to constitutional significance. The Court of Appeals ignored the petitioner's right to a jury trial, and the obligation to ignore harmless error set out in 28 U. S. C. Section 1870 and F.R.C.P. 61. The Court of Appeals ignored the requirement of F.R.C.P. Section 1 that the Rules of Civil Procedure be interpreted to se-

cure the just, speedy and inexpensive determination of civil actions. The Court of Appeals ignored all accepted principles of appellate review in making a *de novo* determination of juror misconduct based upon allegations of fact which had never been presented at the District Court level, and which were not substantiated by anything in the appellate record.

The correct procedure to be followed in a case such as this is to require the complaining party to present admissible evidence that juror misconduct has occurred. Without evidence of juror misconduct, the verdict should stand. The trial court, not the Court of Appeals, should make factual findings in the event that evidence of misconduct is forthcoming. Misconduct should not be presumed, but should be found only when the juror has engaged in dishonesty or acted in bad faith. A finding of dishonesty or bad faith should not automatically require a new trial. If the juror's conduct indicates a prejudice in favor of the complaining party, a new trial should be denied. If the juror's misconduct indicates a biased attitude on an issue which is not submitted for decision, the verdict should stand. If the information revealed by the juror during voir dire is of equal cogency and materiality as the information withheld, the trial court should be entitled to find harmless error. Upon a finding by the trial court that a party has been deprived of information not otherwise known to counsel by the dishonesty or bad faith of a juror, and a finding that the information withheld is indicative of bias against the complaining party on an issue which was determined by the jury, a new trial should be ordered.

Plaintiff's counsel was not in fact deprived of the exercise of his peremptory challenges. All jurors gave honest answers to the questions asked of them. No human being can give more. A standard of law which imposes upon panel members an obligation to read the minds of counsel or to anticipate the issues to be tried is unworkable in fact and unfair both to jurors and to the parties. Jurors are real persons drawn from a cross-section of the community, not abstractions. Honesty and integrity on their part should suffice.

The interrogation of juror Payton subsequent to trial did not reveal any indication that counsel was deprived of the ability to exercise peremptory challenges intelligently. The post-trial "revelations" added nothing to the information already available to counsel. Counsel was already put on notice that juror Payton may have had a different attitude toward pain and suffering than is usual, because Payton had already revealed that he worked as a butcher in a slaughter house. The information revealed by the juror was therefore sufficient to put counsel on notice that this area should be inquired into. Any additional inference to be drawn from the fact that juror Payton's son had once suffered a broken leg is insignificant by comparison.

If the additional information had in fact been significant, it would have been reported to the District Court. It was not. If any juror's attitude toward the seriousness of personal injuries was unusual, it could only be reflected in a damage award, not in a finding of no liability. Because the jury unanimously found no liability, any contention that a juror had an unfavorable attitude on the issue

of damages would constitute a harmless error even if proven.

ARGUMENT AND AUTHORITIES

I. Whether the Court of Appeals deprived Petitioner of its Constitutional right to a trial by jury by vacating the District Court's judgment without any showing of error or prejudice.

The Seventh Amendment to the United States Constitution guarantees civil litigants the right to a trial by jury. Plaintiff's claims against petitioner were based upon the common law, and the relief sought was monetary damages rather than any equitable relief. The constitutional right to trial by jury therefore applies to the present case.

The right to a trial by jury is more than the right to have a jury sit as spectators in the courtroom. That right has no meaning unless the jury's verdict is embodied in the Court's judgment on the merits. The right to a trial by jury is the right to a judgment in accordance with the jury's verdict, or it is nothing. The District Court correctly entered judgment in accordance with the jury's verdict exonerating petitioner from liability. The U. S. Court of Appeals for the Tenth Circuit deprived petitioner of the benefit of the jury's verdict by vacating the District Court's judgment and ordering a new trial. Because the order of the Court of Appeals was contrary to law, and without any rational basis, this petitioner has been deprived of its rights under the Seventh Amendment to the United States Constitution.

In denying petitioner the benefit of the jury's verdict, the Court of Appeals created an irrational and fictitious "right" on behalf of plaintiff, and found that the newly created "right" had been violated. The Court of Appeals held that counsel for civil litigants are entitled to an unspecified level of knowledge concerning prospective jurors, in excess of the information that can in fact be elicited during voir dire examination. The Court of Appeals held that the statutory right of peremptory challenge afforded by 28 U. S. C. Section 1870 implies a right to exercise challenges "intelligently". The implied right to exercise challenges "intelligently" carries with it the implied right to know all information about members of the jury panel which would be "material" to the exercise of challenges, according to the Court of Appeals. "Materiality" is not to be judged in relation to the exercise of peremptory challenges, but in relation to the conduct of voir dire examination. In the present case the Court of Appeals has held that a new trial is required where a juror innocently and in good faith withholds information which might have influenced counsel's conduct of the voir dire examination, whether that information would have resulted in a different use of peremptory challenges or not.

The implication of an abstract "right to know" during jury selection is constitutionally impermissible. There is no constitutional right to the exercise of peremptory challenges, intelligent or otherwise. *Stilson v. United States,* 250 U. S. 583, 586, 63 L. Ed. 1154, 50 S. Ct. 28 (1919). Neither the United States Code nor the Federal Rules of Civil Procedure guarantee to counsel the right to conduct voir dire examination. The trial judge may reserve voir dire examination solely to himself under F.R.C.P.

47(a). All that litigants are guaranteed is the right to exercise three (3) peremptory challenges under 28 U. S. C. Section 1870.

This Court determined nearly five decades ago that the constitutional right to a jury trial in civil actions is subject to reasonable modifications by Congress and the Courts, for the purpose of promoting juror impartiality. See *United States v. Wood,* 299 U. S. 123, 81 L. Ed. 78, 57 S. Ct. 177 (1936); see also *Galloway v. United States,* 319 U. S. 372, 87 L. Ed. 1458, 63 S. Ct. 1077, (1942) and *Frazier v. U. S.,* 375 U. S. 497, 93 L. Ed. 187, 69 S. Ct. 201 (1948). But interference with the role of the jury is strongly disfavored:

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. (*Dimick v. Schiedt,* 293 U. S. 474, 79 L. Ed. 603, 55 S. Ct. 296 (1934) at 293 U. S. 486).

Congress has specified the means by which impartial juries are to be selected, by enacting 28 U. S. C. Section 1866 and 28 U. S. C. Section 1870. These statutory provisions and the Federal Rules of Civil Procedure relating to the selection of juries are reasonable and proper means to achieve the result guaranteed by the Seventh Amendment.

The rule espoused by the Tenth Circuit Court of Appeals in the present case, in contrast to the procedural rules for jury selection, is a substantive principle unrelated to procedure. A rule which permits the avoidance of a jury verdict upon the occurrence of some specified event, which cannot be avoided by the parties, the Court, or any

other participant in the trial, is not a rule of procedure. An absolute right to know the thoughts of jurors, in contrast to a right to inquire of them concerning their beliefs and attitudes, is an arbitrary impairment of the right to trial by jury. The rule can be applied only in the context of a motion for a new trial, and is meaningless as a proposed tool for jury selection.

The Court of Appeals acknowledged that Juror Payton's failure to reveal the fact of his son's injury in response to the question stated by plaintiff's counsel was in good faith and unintentional:

> We accept as true that Mr. Payton did not intentionally conceal the information and held a good-faith belief that his son's injury was not a serious one resulting in disability or prolonged pain and suffering. Good faith, however, is irrelevant to our inquiry. (Petition for Certiorari at A-10).

Thus there is no showing of juror misconduct. There was no finding nor any contention that defense counsel or the trial judge were aware of the information in question, and failed to reveal it to plaintiff's counsel. There was no finding that any other participant in the trial failed to conduct himself properly. The Tenth Circuit has therefore found prejudice without error, and a wrong without a wrongdoer.

The Tenth Circuit Opinion in this case employed a presumption that a juror's failure to reveal information of a certain sort is proof of bias, and of prejudice to the complaining party. It is difficult to perceive how this presumption amounts to anything distinguishable from a finding that the juror would have been challengeable for cause, if the omitted information had been known during the jury

selection process. If the omitted information is not sufficient to warrant the granting of a challenge for cause, there is no basis for a presumption of bias or prejudice. On the basis of simple logic it is difficult to perceive how an unintential failure to reveal information can be indicative of bias against one party rather than the other, or can imply any likelihood that the juror's unexpressed attitude will influence jury deliberations. The opinion of the Court of Appeals enunciated no purpose to be served by presuming bias and prejudice, rather than requiring proof of those circumstances. This presumption certainly cannot withstand the strict scrutiny required by *Dimick v. Schiedt, supra.*

The rule of decision adopted by the Court of Appeals not only fails to meet the strict scrutiny test required by *Dimick,* it also fails to display a rational basis. A presumption of bias only makes sense in the context of challenges for cause. Such a presumption is a self-contradiction when applied to a claimed deprivation of a peremptory challenge.

Two conditions must be met in order for a litigant's right to exercise peremptory challenges to be impaired by a juror's material omission of fact: (1) the unrevealed information must be indicative of an unfavorable attitude toward the position of the complaining party; and (2) the unrevealed information must not be so indicative of bias that a challenge for cause would have been granted, if the information had been known. Because any information which is of sufficient significance to warrant an irrebuttable presumption of bias and prejudice would also be sufficient to support a challenge for cause, it would appear that there is no circumstance under which the rule adopted

by the Tenth Circuit can be applied. Where the right of *peremptory* challenge is involved, implied bias and prejudice have no place.

Even if the presumption adopted by the Tenth Circuit were allowable, due process would require an evidentiary hearing on the issue of materiality. The constitutionally mandated procedure for the determination of questions relating to alleged juror misconduct is a hearing before the trial judge. See *Smith v. Phillips,* 455 U.S. 209, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982); *Remmer v. United States,* 347 U.S. 227, 98 L. Ed. 654, 75 S. Ct. 450 (1954); *Dennis v. United States,* 339 U.S. 116, 94 L. Ed. 734, 70 S. Ct. 519 (1950). It is the District Courts, not the Courts of Appeal, which are equipped to enable determinations of fact:

> Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence. *Hormel v. Helvering,* 312 U.S. 552, 85 L. Ed. 1037, 61 S. Ct. 719 (1941), 312 U.S. at 556.

The majority members of the Court of Appeals panel refused to consider evidence of the information available to counsel in the absence of the allegedly suppressed information, or to consider the manner in which counsel responded to information of similar import during the jury selection process. The dissenting justice's suggestion that

the case be remanded for an evidentiary hearing was also rejected. This attitude deprived petitioner of the right to rebut the allegations made by plaintiff's counsel, and thereby deprived petitioner of the most rudimentary due process rights. The refusal of the Court of Appeals to consider any evidence of materiality in fact, versus presumed materiality, resulted in an unqualifiedly arbitrary decision.

The Court of Appeals made its finding that plaintiff's counsel was deprived of "material" information *in vacuo*. According to the majority opinion of the Court of Appeals, the presence or absence of good faith on the part of the juror whose conduct is questioned is irrelevant. According to the majority opinion of the Court of Appeals, the manner in which plaintiff's counsel exercised peremptory challenges is irrelevant. The relative significance and weight of the unrevealed information, compared to that which was revealed, is also irrelevant. Any inquiry into the fairness of the trial afforded to plaintiff also is apparently irrelevant. The failure of plaintiff's counsel to inform the trial court of the facts on the basis of which the Court of Appeals felt compelled to grant a new trial is also irrelevant. The presence or absence of any inference that the presumptive bias of juror Payton in any way influenced the verdict is also irrelevant. The question Petitioner must therefore ask is whether any fact is relevant to the decision of the Court of Appeals in this case?

The only circumstance appearing in the record which is stated to have had any bearing on the decision of the Court of Appeals is the failure of the trial judge to grant defendant's motion for a directed verdict:

> We emphasize that plaintiff's cause of action is not a groundless one. The District Court found plaintiff's

> evidence sufficiently substantial to justify submission of their theory of liability to the jury. We are therefore satisfied that our remand for a new trial is not an exercise in futility. (Petition for Certiorari at page A-10).

It would therefore appear that a defendant in the Tenth Circuit has no right to a trial by a jury unless the plaintiff's evidence is so insubstantial that a directed verdict is in order. By this reasoning, a defendant is entitled to a trial by jury only when a plaintiff is not. Where a directed verdict against the plaintiff is proper, the defendant certainly has no need of a jury trial. According to the Tenth Circuit, a plaintiff has a right to a new trial whenever he has a right to any trial. A defendant is never entitled to the benefit of a jury verdict by this reasoning.

II. Whether the Court of Appeals applied an erroneous standard of law to the facts alleged in plaintiff's appeal brief, by holding that a new trial is required whenever counsel does not receive information which might be material to the exercise of peremptory challenges.

Even if the rule of presumptive bias and prejudice followed by the Tenth Circuit Court of Appeals were constitutionally permissible, it would not be good law. Other Circuit Courts of Appeal have historically followed a more reasonable formula for reviewing allegations of jury misconduct during voir dire examination. The rule followed by the Tenth Circuit is especially objectionable because it requires no showing of prejudice to any substantial right of the complaining party, contrary to 28 U. S. C. Section 2111 and F.R.C.P. 61.

The rule applied by the Tenth Circuit focuses upon the nature of the information which counsel claims should have been revealed. If that information would have been

revealed by an "ordinary juror", and if the typical counsel representing a litigant similar to the complaining party would take that information into account in conducting voir dire examination, the Tenth Circuit will order a new trial. No other Circuit Court of Appeals adheres to such a rule. Although there appears to be no uniformity among the rules applied in the various Circuits, it would appear that a new trial is required in the present case only under the rule followed in the Tenth Circuit.

Some of the earlier cases involving the failure of jurors to reveal information during voir dire showed good sense and great practicality. For example, in *Orenberg v. Thecker,* 143 F. 2d 375 (D. C. Cir. 1944), an unsuccessful plaintiff complained that only one juror revealed past personal injuries during voir dire, when in fact three jurors should have answered. The analysis of the issue by Justice Miller of the D. C. Circuit is worthy of quotation in full:

> The second specification is that some jurors gave false answers or concealed material information by silence when questioned on the voir dire, concerning claims for personal injuries previously suffered by them. The questions propounded to the panel—and in response to which two jurors remained silent—were: (1) 'Have any of you even been plaintiffs in a case involving personal injuries in an automobile accident, or any other kind of an accident? Have you ever presented a claim against anyone for personal injuries, whether arising out of an automobile accident, or an accident in a store, apartment house or hotel?' and (2) 'Is there anyone else who has had a claim of any kind involving personal injuries?' It can be too easily assumed that laymen, called from ways of life far removed from the courtroom, will understand words and terms of art customarily used by lawyers and judges.

As a matter of fact, many such words are not well understood by lawyers and judges themselves. It would be a violent assumption that such laymen will be alert to give considered answers to questions containing several such words or terms, or that failure to respond constitutes concealment or a false answer. For example, even to lawyers and judges, such words as 'claim' and 'presented' have varied meanings. Some laymen, who have had no courtroom experience, do not know the meaning of 'plaintiffs,' 'personal injuries' and other words which were used in the questions propounded by counsel for appellants. Within the last year this court had occasion to decide a dispute between able counsel as to the meaning of the words plaintiff and defendant, as used by Congress in recent legislation. It would be asking a great deal of laymen that they be certain and confident in the use of lawyers' words when lawyers themselves disagree as to their meaning. It would be grim irony to insist that our juries must constitute a representative cross section of all the people if at the same time impossible standards of performance were imposed. Moreover, in the present case, the questions propounded were not directed to each venireman separately. Instead, they called for voluntary responses upon the initiative of each. Many lawyers, remembering their own first appearances in court, will understand the trepidation of a layman who, for perhaps the first time in his life, occupies the spotlighted position of the jury box; and his reluctance to discuss with able counsel, abstract legal issues such as those implicit in the questions propounded in the present case. These are the considerations which must be kept in mind in determining whether there was such giving of false answers or concealment of material information as to constitute misconduct and require, so compellingly, the granting of a new trial as to establish abuse of discretion upon the part of the trial judge. (143 F. 2d at 376-378).

This early opinion recognizes that jurors are human beings, unlike the opinion of the Tenth Circuit in the present

case. The *Orenberg* opinion should also serve to remind everyone that there are as many innocent explanations for human conduct as there are guilty ones, and that therefore bias against a litigant should not be inferred from a juror's failure to speak up during questioning of this sort.

Presumptive implication of bias is not favored by this Court. Only last term, in *Smith v. Phillips*, 455 U. S. 209, 71 L. Ed. 2d 78, 102 S. Ct. 940, this Court refused to adopt a principle of implied bias based solely upon prosecutorial misconduct and/or juror misconduct in the context of a habeas corpus proceeding. This Court held in *Smith* that allegations of juror bias are best handled by a hearing before the trial judge, in which each side is given an opportunity to present evidence concerning the actual bias of the juror, and the actual impact of the alleged bias upon the trial. *Smith v. Phillips* stands for the proposition that new trials will not be granted automatically even where clear error appears on the record either in the form of misconduct by counsel or an indiscretion by a juror, in the absence of a finding by the trial judge based upon admissible evidence that the complaining party was deprived of a fair trial. *A fortiori*, no new trial should be granted where neither counsel nor a member of the jury has behaved improperly and there is no direct showing of bias or prejudice.

As outlined above in the argument relating to the constitutional aspects of this case, it is difficult to conceive of a situation where a presumption of bias and prejudice would be reasonable, in the context of an alleged deprivation of peremptory challenges. If the information concealed by a juror is so significant that a presumption of bias is warranted, a challenge for cause

would be proper and no peremptory challenge would be needed. A bona fide claim that a peremptory challenge, rather than an opportunity to demand challenge for cause, has been impaired will occur only under the most peculiar circumstances.

A majority of Federal Courts facing allegations of juror misconduct of this sort have refused to order new trials in the absence of evidence sufficient to warrant a challenge for cause. Five circuits apparently refuse to order new trials where the juror's failure to speak up has been unintentional: See *Atlas Roofing Manufacturing Co. v. Parnell*, 409 F.2d 1191 (5th Cir. 1969), *Vezina v. Theriot Marine Service, Inc.*, 554 F. 2d 654 *after remand*, etc., 610 F. 2d 251 (5th Cir. 1980); *Johnson v. Hill*, 274 F. 2d 110 (8th Cir. 1960), *Hansen v. Barrett*, 186 F. Supp. 527 (D. Minn. 1960), *Morrison v. Ted Wilkerson, Inc.*, 343 F. Supp. 1319 (W. D. Mo. 1971); *Christian v. Hertz Corporation*, 313 F. 2d 174 (7th Cir. 1963); *Fritz v. Boland & Cornelius*, 287 F. 2d 84 (2nd Cir. 1961); and *Orenberg v. Thecker, supra.*

The Fourth Circuit apparently gives no special weight to the presence or absence of intentional concealment, but does not presume bias or prejudice. See *Faith v. Neely*, 41 F. R. D. 361 (N. D. W. Va. 1966). Only one reported decision outside the Tenth Circuit applies a limited presumption of bias. In *McCoy v. Goldston*, 652 F. 2d 654 (6th Cir. 1981), it was held that deliberate concealment of information by a juror requires a new trial without further showing of prejudice. See 652 F. 2d at 658. Like the Tenth Circuit, the Sixth Circuit relied upon decisions rendered prior to the adoption of the harmless error rule in adopting a presumption of prejudice.

In the case of *Laugherty v. Newcomb,* 237 F. Supp. 524 (E. D. Tenn. 1962), a new trial was denied even though the complaining party still had unused peremptory challenges, on the basis that a juror's innocent failure to answer a question due to his failure to understand the terminology used by counsel is not indicative of bias. See 237 F. Supp. at 527-529. In the Fifth Circuit, the jury's verdict will not be overturned even if the juror failed to reveal information which would have disqualified him from sitting on the jury. Such was the result in *Atlas Roofing Manufacturing Co. v. Parnell, supra.* In that case, the juror failed to reveal that he had been convicted of a felony some 20 years earlier. The Court of Appeals acknowledged that this information, if known, would have required the removal of the juror in question under 28 U. S. C. Section 1861(1), but held that the juror's innocent failure to reveal this information did not require a new trial in the absence of a showing of actual bias and prejudice. See 409 F. 2d at 1193.

The schism between the Tenth Circuit and the remainder of the U. S. Circuit Courts of Appeal began in 1958, with the case of *Consolidated Gas & Equipment Co. of America v. Carver,* 257 F. 2d 111 (10th Cir. 1958). In that case the jury foreman failed to reveal during voir dire that he was the plaintiff in a pending personal injury action. The Tenth Circuit reversed the order of the Trial Court denying the defendant's motion for new trial. The Tenth Circuit found an abuse of discretion in denying a new trial, because (1) the juror's injury was very similar to the injury claimed by plaintiff, and (2) the trial judge admitted that the foreman would have been excused for cause, if the court had known of the foreman's pending

action. The Tenth Circuit further found that the defendant had made a sufficient showing that it would have used a peremptory challenge against the foreman, if a challenge for cause would have been denied. See 257 F. 2d at 115. The *Consolidated Gas* opinion went further than was necessary, however, in holding that the existence of an unrevealed bias required a finding that the juror was "not competent". No authority was cited for the proposition that bias alone renders a juror "incompetent". See 257 F. 2d at 116.

The unfortunate dictum from *Consolidated Gas* was quickly seized upon by litigants. Juror incompetence based upon the pendency of a juror's personal injury claim was alleged in *Fritz v. Boland & Cornelius,* 287 F. 2d 84 (2nd Cir. 1961). The Second Circuit distinguished *Consolidated Gas,* and rejected the dictum used by the Tenth Circuit:

> Invocation of the defendant's concept of 'competency'—in its requirement of 12 such 'competent' jurors—into the factual setting of this case would result in unwarranted reversals of perfectly fair jury verdicts and would inject an unjustifiable degree of instability into the jury system. (See 287 F. 2d at 86).

The Second Circuit refused to order a new trial in the *Fritz* case, despite some inference of juror bias, due to the complete absence of any evidence that the juror's bias resulted in any prejudice to the complaining litigant. See 287 F. 2d at 86.

The Tenth Circuit Court of Appeals diverged even further from the main stream of Federal Decisions in *Photostat Corporation v. Ball,* 338 F. 2d 783 (10th Cir. 1964). In that case four members of the jury panel failed

to reveal personal injury claims despite a request by counsel for such information. The Trial Court denied the defendant's motion for a new trial, finding that each of the jurors honestly misunderstood counsel's questions and that no juror had intentionally deceived counsel. The Tenth Circuit Court of Appeals reversed and ordered a new trial.

The *Photostat* opinion first discussed decisions relating to implied bias which were decided before the enactment of the harmless error rule in 28 U. S. C. Section 2111 and F.R.C.P. 61. The Tenth Circuit distinguished peremptory challenges from challenges for cause on the basis that peremptory challenges are made at the sole discretion of counsel and require no articulable justification. The opinion described the holding of *Consolidated Gas* in the following terms:

> [In *Consolidated Gas* we] embraced the settled rule which moves the Court to act only upon a showing of probable bias of the juror with consequent prejudice to the unsuccessful litigant. Courts act on probabilities, not possibilities, and if the suppressed information is so "insignificant or trifling" as to indicate only a remote or speculative influence on the juror, the right of peremptory challenge has not been affected. (See 338 F. 2d at 786).

The *Photostat* opinion then went on to ignore this statement of unquestioned law. The requirement of proof of juror bias resulting in prejudice was reduced to a new and different formula:

> It is enough, we think, to show probable bias of the jurors and prejudice to the unsuccessful litigant if the suppressed information was of sufficient cogency and significance to cause us to believe that counsel was

> entitled to know of it when he came to exercise his right of peremptory challenge. If so, the suppression was a prejudicial impairment of his right. (See 338 F. 2d at 787).

The means by which the "materiality" test was derived from the principle of "bias resulting in prejudice" was not explained. It can only be surmised that the stress placed by the Court on the harmful effects of less than completely truthful answers is indicative of an excessive concern with abstract rights, without consideration of the particular means for achieving just results.

The Fifth Circuit has expressly rejected the rule of *Photostat*. In *Vezina v. Theriot*, 554 F. 2d 654 (1977), *after remand* 610 F. 2d 251, the presumption of bias and prejudice employed in *Photostat* was expressly rejected, in favor of the more usual procedure of allowing the trial court discretion to make findings of fact in each case subject to review for abuse of discretion. See 554 F. 2d at 656.

A trial judge confronted with allegations of juror misconduct in the context of a motion for new trial should grant a new trial only where error has occurred. Where a litigant has been deprived of basic due process, a new trial is certainly in order. A deprivation of due process should, however, be found only where one or more members of the jury are not qualified to render a verdict. Disqualification from jury duty under 28 U. S. C. Section 1861 should be a sufficient ground for granting a new trial. A trial judge should also be entitled to order a new trial if he finds, based upon all pertinent evidence, the three elements most commonly cited by the various circuits:

(1) The juror has concealed information from counsel, rather than merely failing to hear or understand a question;

(2) The information concealed by the juror is, in the opinion of the trial court, indicative of actual bias against the position of the party seeking a new trial; and

(3) The untruthful juror's bias has had some impact upon the rendition of a verdict adverse to the moving party.

The trial judge should be given wide latitude and discretion in exploring these elements. The policy considerations against inquiring into the internal workings of the jury embodied in Federal Rule of Evidence 606 should determine the nature of the inquiry.

Material circumstances which should be considered by a trial judge confronted with an alleged deprivation of the right to exercise peremptory challenges intelligently should include the following:

(1) Did the complaining party exercise a peremptory challenge against anyone who revealed information similar to that concealed?

(2) Would the concealed information significantly have added to the information available to counsel at the time peremptory challenges were exercised?

(3) Did counsel for the complaining party have an adequate opportunity to inquire into the subject in question, but fail to do so?

(4) Would the concealed information have warranted the granting of a challenge for cause, if it had been known?

(5) Under all the facts and circumstances of the trial, does it appear to the trial court that the complain-

ing party was deprived of a fair trial despite the diligence of counsel and court in trying to select an impartial jury?

The trial judge is in a much better position to make these determinations than is any appeals court panel, since the trial judge has had an opportunity to observe the demeanor of the jurors during the course of the trial. The trial judge is also intimately familiar with the issues presented by the parties at trial, and so is a much better judge of the manner and extent to which personal circumstances might result in bias against the position taken by one of the parties.

A Court of Appeals should follow standard practice in reviewing trial court determinations on these issues. The Court of Appeals should not reverse the District Court and order a new trial absent a showing of abuse of discretion by the trial judge. If the trial judge has not abused his discretion in denying the motion for new trial, there is no compelling reason why the Court of Appeals should order a new trial on its own initiative. At all times both the trial judge and the Court of Appeals panel should obey the mandates of F.R.C.P. 61 and 28 U. S. C. Section 2111, and ignore any alleged juror misconduct which cannot be shown to have produced a prejudicial result.

III. Whether the Petitioner is entitled to a judgment in accordance with the jury's verdict under the correct standard of law for any or all of the following reasons:

(a) The facts presented by plaintiff do not establish a prima facie case of juror misconduct;

(b) The inference of prejudice suggested by plaintiff was contradicted by all evidence in the record; and

(c) Plaintiff's claim of juror misconduct was waived by failing to present evidence on that issue to the District Court.

When the principles of law discussed above are applied to the facts in the present case, there is no reasonable doubt that Petitioner was entitled to the entry of judgment in its favor in accordance with the jury's verdict. Respondents presented no evidence in support of their motion for a new trial which would warrant a contrary conclusion. Even the allegations made on appeal, which were not based upon anything in the District Court record, are insufficient to warrant a new trial. Certainly there has never been a showing that the District Court abused its discretion in denying a new trial.

At the District Court level, Respondents' motion for new trial contained no allegations that juror misconduct had in fact occurred. The only ground alleged in support of the motion which related to juror conduct was the claim that counsel should have been permitted to inquire generally of the jury in pursuit of evidence of misconduct. (Appendix pp. 93-94).

The only allegations of juror misconduct were made in Respondents' two motions to approach jurors. (Appendix pp. 67-71, 86-88). The first motion to approach jurors was denied on the basis that Respondents had failed to present any evidence that juror misconduct had in fact occurred. (Appendix at pp. 72-74). The second motion to approach juror Payton was granted, but with a specific finding that there was as yet no evidence in the record to substantiate a finding of bias or prejudice resulting from the alleged misconduct. (Appendix at pp. 89-90).

The only evidence submitted to the District Court in support of the contention which was so convincing to the Tenth Circuit Court of Appeals was the affidavit of John Greenwood. That affidavit indicated that juror Payton's son had suffered a broken leg. (Appendix at pp. 87-88). The affidavit neither asserted nor supported any contention that juror Payton had falsely answered a question during voir dire, as the District Court noted in its order granting the motion:

> Counsel should be informed that the Court's review of the court reporter's notes of voir dire indicates that plaintiff's counsel's questions should have elicited a response from the juror only if 1) his son was in an accident as alleged and 2) the son sustained a disability or suffered prolonged pain. (Appendix at p. 89).

The District Court was never presented with any evidence that either of these conditions were present, and therefore there was no evidence that juror Payton had answered falsely.

Under these circumstances the District Court would have abused its discretion if the motion for a new trial had been granted. If all members of the jury truthfully answered all questions put to them, there cannot be even a theoretical impairment of the right to peremptory challenge. In the absence of juror concealment, there was no analysis to be made of potential bias or prejudice.

The District Court order granting permission to approach juror Payton also noted that the undisclosed information showed no signs of having been a material consideration of counsel during the exercise of peremptory challenges. Similar information had been revealed by other jurors, and none who revealed such information were

stricken. (Appendix at p. 90). The undisclosed information was not self-evidently indicative of bias against a plaintiff in the position of Respondents. (Appendix at pp. 89-90).

These preliminary findings by the District Court should have been given the same respect as any other finding of fact made by a trial judge in the context of a motion for new trial. Based upon the entire record presented to the District Court, it could reasonably have been found that juror Payton truthfully answered all questions put to him, that any failure to reveal information on his part was not indicative of bias, that the information which was not disclosed was insignificant or trivial, and that such information was not in fact material to counsel in deciding how to conduct void dire or to exercise peremptory challenges.

The Court of Appeals never made any analysis of the rectitude of the District Court's decision. No consideration was given to, nor was mention made of, the standard for review of orders denying new trials. The Court of Appeals made determinations of fact and drew conclusions of law contrary to those of the District Court, on the basis of factual allegations appearing nowhere except in Respondents' appeal brief. The findings and conclusions of the Court of Appeals are contradicted by the facts related by Petitioner in its appeal brief.

Even if the facts alleged by Respondents were accepted as true, and even if these facts had been presented at the District Court level, they would not constitute a *prima facie* showing of juror misconduct indicative of bias and resulting in prejudice against Respondents. Under the proper legal standard a juror has not concealed information when he has fully answered a question in accordance

with his understanding of the question. A juror's failure to conform to the standard of behavior of a hypothetical "reasonable juror" is at most negligence, not concealment. Even if an "unreasonable" answer were to be considered a concealment, there has never been a contention of actual bias or prejudice in this case, let alone any evidence of bias or prejudice.

The only alleged difference that a "reasonable" answer by juror Payton would have made is the surmise that counsel might have conducted his voir dire examination of juror Payton more thoroughly than otherwise. There has never been a contention, and certainly there has never been a finding by any court, that peremptory challenges more likely than not would have been used differently than they were in fact. There has never been a contention, nor a finding by any court, that juror Payton was in fact biased against a plaintiff in the position of Respondents. There has never been a contention, or a finding by any court, that the unrevealed injury to juror Payton's son influenced the jury's verdict in any way.

The transcript of voir dire examination, and the clerk's minute sheet setting forth the peremptory challenges of the parties, reveal no indication that any peremptory challenge was exercised on the basis of a venireman's attitude toward pain, suffering or injury. Each juror was asked to affirm that he or she felt capable of deciding the case solely on the basis of the evidence presented, uninfluenced by any pre-existing personal preference for or against either of the parties. (Appendix pp. 47-48, 57-62).

Last but of greatest significance is the fact that juror Payton's alleged bias could only rationally have affected his assessment of damages. There is no rational explana-

tion for how a "particularly narrow concept of what constitutes a serious injury" can induce a juror to find that a lawn mower is not defective or unreasonably dangerous, as all jurors unanimously did in this case. Surely there is no inference so compelling that a reversal of the District Court's decision is in order.

By the Tenth Circuit's own prior decisions, the failure of Respondents to inform the District Court of juror Payton's post-trial comments prohibits reversal on appeal on the basis of those comments:

> It is fundamental that a party seeking reversal must establish that alleged trial errors were prejudicial. Matters not appearing in the record will not be considered by the Court of Appeals. See *Neu v. Grant*, 548 F. 2d 281 (10th Cir. 1977), at 286.

This principle is in accordance with the general principles of appellate review quoted from *Hormel v. Helvering, supra.*

Counsel exercised their peremptory challenges intelligently, by striking those veniremen who showed some indication, however slight, of empathy for product designers and manufacturers. Any challenge exercised in anticipation of a juror's unwillingness to award substantial damages would have been wasted in this case. The Tenth Circuit therefore has ordered a new trial because Respondents' counsel were deprived of an opportunity to be misled into squandering a challenge. Such a result cannot be good law, and it certainly is not justice.

CONCLUSION

For all of the above stated reasons the decision of the Tenth Circuit Court of Appeals should be reversed, and the judgment of the District Court should be reinstated. The decision of the Court of Appeals is erroneous because error and prejudice were conclusively presumed on the basis of contentions of fact not contained in the record and not presented at the District Court level. The factual allegations made by Respondents at the appellate level are insufficient to raise an inference of juror concealment of material information, juror bias, or prejudice to the rights of Respondents. Unquestionably these factual allegations are insufficient to warrant a reversal of the District Court's findings to the contrary.

In the alternative, if it should be found that a prima facie case of juror misconduct was made, the case should be remanded for a hearing before the District Court. In the event of remand, the District Court should be instructed to consider all pertinent and admissible evidence in determining whether concealment has occurred, whether the concealment if any was material, and whether such concealment is indicative of bias resulting in prejudice to the rights of Respondents.

Respectfully submitted,

FISHER, PATTERSON, SAYLER & SMITH
400 First National Bank Tower
Topeka, Kansas 66603
(913) 232-7761

By DONALD PATTERSON

By STEVE R. FABERT

(THIS PAGE INTENTIONALLY LEFT BLANK)